Supreme Court, U.S.
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No. 96-1662

In The

Supreme Court of the United States

October Term, 1996

MARVIN DANIELS,

Petitioner,

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Missouri Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Federal Employers' Liability Act, may an injured worker be held to be an "insurer" of his own safety and thereby be completely barred from recovery even though his negligence was not the sole cause of his injuries?

LIST OF PARTIES

The parties to the proceeding in the Circuit Court of Jackson County, Missouri at Kansas City were the petitioner, Marvin Daniels, and the respondent, The Kansas City Southern Railway Company.

Pursuant to Supreme Court Rule 29.1, The Kansas City Southern Railway Company states that its parent company is Kansas City Southern Industries, Inc. ("KCSI"). KCSI also owns (either wholly or partially) the following subsidiary companies: Southern Group, Inc., Carland, Inc., Southern Capital Corporation LLC, Gateway Western Railway Company, Janus Capital Corporation, Berger Associates, Inc., Wyandotte Garage Corporation, Trans-Serve, Inc., Pabtex, Inc., DST Systems, Inc., Mexrail, Inc., and Transportacion Ferroviaria Mexicana S. de R.L. de C.V.

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STATEMENT OF THE CASE

After working for respondent KCS as a clerk for twenty-three years, petitioner Marvin Daniels decided to begin working as an over-the-road locomotive engineer. Accordingly, Daniels applied for, was accepted in and completed KCS' locomotive training program. For the next fourteen years, Daniels worked steadily as a KCS engineer.

In recent years, in order to train new engineers, Daniels' labor union, The Brotherhood of Locomotive Engineers ("BLE"), and KCS collaborated and implemented a comprehensive engineer training program. Students accepted into the program received three separate stages of training over six months. First, applicants met for a general orientation class in which the training program was discussed and comprehensive written materials, including operating manuals and track charts, were distributed. Trainees then worked for 60-90 days under the direct supervision of a fully qualified engineer (such as Daniels) to obtain "hands on" locomotive operating experience. Finally, trainees returned to the classroom for two weeks of additional intensive training, including use of a simulator. KCS was not free to alter the contents or sequence of the engineer training program because it was encompassed within the KCS-BLE collective bargaining agreement.

Pursuant to the collective bargaining agreement, KCS was required to utilize existing engineers, such as Daniels, as engineer-instructors. These engineers were regularly tested and required to be familiar with the training materials. At trial, Daniels repeatedly admitted he knew exactly what he needed to do to train student-engineers.

Existing engineers were never forced to work as instructors – they could decline, and many did so without penalty. Instead of declining that responsibility, however, Daniels actually sought out trainees because instructors were paid more for trips.

Daniels served as an instructor 25-50 times prior to June 17, 1991, and admitted he knew his responsibilities as an instructor, was well-trained therefor, accepted those responsibilities, knew he was required to be vigilant at all times with a trainee, and knew he needed to be in a position to take over control of the train at all times. The uncontroverted evidence at trial established that the collective bargaining agreement explicitly placed the responsibility for safety on the engineer-instructor:

> He [the engineer-instructor] will . . . be responsible for the safe movement of his train and engine.

Daniels conceded during trial that he, as the instructor – and not any student-engineer – bore sole responsibility for operation of the train and engines.

Daniels reported for work at 4:00 p.m. on June 17, 1991. Daniels was informed he would have student B. R. Petry with him that day. Although he always had the option to decline taking a student, Daniels accepted the responsibility (and extra pay).

Before applying for the engineer training program, Petry had worked as a brakeman for KCS for thirteen years, was considered a good worker, and was familiar with railroad practices. Daniels admitted he worked with Petry while Petry was a brakeman, and had no complaints. Petry had satisfactorily completed his entrance examination, received positive recommendations from his

supervisors, and a favorable review of his work history. Petry had successfully completed the introductory orientation program, then operated trains for nine days under the supervision of qualified engineer-instructors before this incident. Petry satisfactorily completed all prior runs – none of his other instructors voiced any problems, criticisms or complaints to KCS.

KCS' operating rules and the collective bargaining agreement mandated that the engineer-instructor must always be in a position to observe all operating movements of the student, to observe signals given by other workers on the ground, and to be in a position to stop, slow or take over control and operation of the train if necessary. Daniels confessed that as the instructor, he was obliged to maintain constant vigilance and control since, by definition, engineer-trainees lacked experience in train handling. Furthermore, as the instructor, Daniels was required to ensure Petry was familiar with the engine controls and their job that day. As the instructor, Daniels possessed discretion to determine whether, and how much, a given student would be allowed to operate the engines. On June 17, 1991, Daniels permitted Petry to commence the movements necessary to couple two engines to a parked coal train on the KCS main line.

To couple the two engines onto the front of the coal train, three distinct forward and reverse movements had to be made. First, the two engines had to move in reverse 2,400 feet past a crossover switch. During this first maneuver, Petry operated the locomotives satisfactorily, but allowed his speed to increase beyond the yard speed limit of 10 miles per hour to 16 miles per hour. During

this first movement, Daniels stood by Petry in the engineer control stand, was attentive, instructed Petry to reduce his speed. Petry immediately complied.

During the second maneuver, Petry was required to move the engines approximately 626 feet forward, then stop again. During that second maneuver, Petry started, stopped and operated the engines satisfactorily, but again allowed his speed to increase to 12 miles per hour. Once again, Daniels correctly instructed Petry to reduce his speed and Petry immediately complied.

The third and final coupling maneuver was the most critical aspect of the job. In order to couple the two engines onto the front of the parked coal train, the engines had to be moved in reverse 437 feet. Proper couplings are to be made at no more than four miles per hour. Proper approach speed during the coupling maneuver is crucial because the coupling is made "metal to metal," and the stationary coal train would not "budge" upon impact.

Although Daniels had been standing and observing Petry's train handling during the first two maneuvers (and knew Petry "was fast"), during the final, critical maneuver, Daniels sat down in a seat in the middle of the cab and faced the direction opposite the movement of the train. From that position, Daniels could see virtually nothing. Instead, during this most critical maneuver, Daniels sat with his head down "fiddling with his cooler of blackberries."

As Petry commenced the reverse coupling maneuver, the speed of the locomotive climbed to 12 miles per hour, three times the proper coupling speed. Daniels, however,

failed to monitor or control the speed of the train, gave no instructions to Petry, failed to order Petry to apply the brakes and slow the train down, and failed to take control and apply the brakes himself. In fact, Daniels admitted he was not monitoring speed at the time of the coupling. Because of the high speed of the engines and since he was facing the opposite direction of travel, fiddling with his blackberry cooler with his head down, upon impact, Daniels' head hit the wall of the engine cab causing Daniels to sustain a mild concussion.

Daniels admitted the engineer training program was necessary, admitted he knew his responsibilities as an instructor, and confessed he accepted his responsibility to control operation of the train at all times. Daniels' own evidence established that no complaints or requests for changes were ever received regarding the engineer training program. No evidence was offered to prove KCS received prior notice of any problems with, or complaints about, the engineer training program in general, or student Petry in particular. No evidence was offered of any prior injuries or accidents. Indeed, during discovery, Daniels admitted he had no notice evidence.

At the close of Daniels' case, and all the evidence, KCS moved for directed verdicts noting that Daniels' claims were not submissible under 80 years of United States Supreme Court precedent because he was injured as a result of his own breach of an independent duty. KCS additionally noted Daniels failed to produce prima facie evidence to support his verdict directing instruction. The trial court provisionally denied KCS' motions. After the return of the jury's verdict, KCS timely filed its Motion for Judgment Notwithstanding the Verdict. Daniels filed

no opposing suggestions. Following oral argument, the trial court sustained KCS' Motion for Judgment Notwithstanding the Verdict, and judgment was so entered.

ARGUMENT

Petitioner, in urging that a writ be granted, states that the "novel and very dangerous" opinions of the lower courts herein "violated clear standards and ignored controlling United States Supreme Court precedent." Petitioner does not cite to this precedent because, in point of fact, the previous decisions of this Court wholly support the reasoning of the lower courts.

For eight decades, this Court has declared that an FELA plaintiff cannot recover for injuries resulting from his own breach of an independent duty. Based upon those cases, KCS requested, and the trial court submitted, a complete affirmative defense instruction. Daniels has neither challenged the procedural nor substantive elements of that affirmative defense instruction in pursuing his appeal. In fact, Daniels adduced testimony within his own case supporting all elements of that instruction. Consequently, judgment notwithstanding the verdict was correctly entered as a matter of law.

Daniels repeatedly admitted he was solely in charge of the movement of the engines and trainee Petry at the time of the coupling maneuver. Moreover, Daniels confessed that instead of performing his duties, he was sitting down, looking the opposite direction, fiddling with his blackberry cooler. Daniels never looked at the engine speedometers, allowed the train to approach at a speed

three times too fast, and never pulled the emergency brake or told Petry to stop or slow down. Daniels repeatedly adduced testimony within his own case that he was ultimately responsible for the train's movements and any accidents, and that he violated a handful of KCS' operating and safety rules.

Daniels' post-accident FELA lawsuit was literally an attempt to sue himself. The trial court correctly nullified that effort and the lower courts, relying on the established precedents of this Court, have affirmed that decision. Judgment notwithstanding the jury's verdict was correctly entered for KCS for at least two independent and equally dispositive reasons.

- First, under a long line of United States Supreme Court precedent, Daniels' claims are barred as a matter of law because he bore an independent duty to control the engines (and trainee Petry), failed to do so, and was injured as a result.

- Second, it has long been established that a verdict cannot stand, and judgment notwithstanding the verdict must be entered, if there is a void of evidence to support any one element of the plaintiff's verdict director and the evidence elicited during Daniel's own case negated the "notice" element of his verdict director.

A. KCS Was Entitled To Judgment Notwithstanding The Verdict Because Under A Long Line Of United States Supreme Court Precedent, Daniels' Claims Were Barred As A Matter Of Law Because He Bore An Independent Duty To Control The Engines (And Trainee Petry), Failed To Do So, And Was Injured As A Result

The Federal Employers' Liability Act provides:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury resulting in whole or in part *from the negligence of any of the officers, agents, or employees* of such carrier, or by the reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works. . . .

45 U.S.C. § 51 (1986) (*emphasis added*). The uncontroverted evidence at trial established that a KCS employee's negligence caused this accident; that KCS employee was Daniels. Because of the unique circumstances established by the uncontroverted evidence, namely, the fact that Daniels was in charge at the movement and operations of the engines, the trial court, pursuant to federal substantive law, properly entered a judgment in favor of KCS notwithstanding the verdict.

This Court has established law, starting with *Great Northern Ry. Co. v. Wiles*, 240 U.S. 444 (1916) and ensuing cases, that railroad employees may not recover under the FELA against their employer for injuries caused by their own neglect of some independent duty arising out of the employer-employee relationship. The line of cases construing this principle of law compelled the entry of a

judgment in KCS' favor. For instance, in *Wiles*, a rear brakeman on the back portion a parted (or split) freight train disregarded his duty to go back a short distance and give warning signals to approaching trains notwithstanding the railroad's safety rules which required the brakeman to protect the rear of the train. *Id.* at 446. Instead, the brakeman remained in the caboose, and was killed by an approaching passenger train that collided with the brakeman's train. *Id.* at 448.

On the ensuing appeal of the plaintiff's jury verdict, this Court noted that the railroad's safety rules imposed a duty on the rear brakeman to go down the track and make appropriate signals to any on-coming trains. *Id.* at 447. The Court, in reversing the lower court judgment, declared that to excuse the brakeman's neglect "in any way would cast immeasurable liability upon the railroads, and remove security from the lives of those who travel upon them." *Id.* at 448. The brakeman's estate argued that a jury was entitled to sort out the parties' respective negligence – the brakeman's negligence in not signaling the train and the railroad's negligence in causing the train to be split in the first instance. The Court dismissed such an argument, concluding, in light of the brakeman's conduct, that "[t]here [wa]s no justification for a comparison of negligence or the apportioning of their effect." *Id.*

Wiles is the basis for a long line of similar cases. For instance, in *Frese v. Chicago, Burlington & Quincy Railroad Co.*, 263 U.S. 1 (1923), the estate of a deceased engineer appealed a decision of the Missouri Supreme Court reversing the estate's earlier favorable jury verdict. The deceased engineer had been in charge of his train on the

date of his death. The train was stopped 200 feet from a crossing while another train was also stopped some 300 feet (in the opposite direction) from the same crossing. The view from both trains was obstructed intermittently. Neither train crew discovered the presence of the other train until after the two collided.

This Court, in affirming the outright reversal of the jury verdict, noted that an applicable Illinois statute imposed a duty on the deceased engineer to ascertain that the way was clear before entering a crossing. In so finding the engineer's failure to abide by this statute dispositive, the Court rejected an argument that the engineer's death could have been prevented if his subordinates had been on the lookout, with Justice Oliver Wendall Holmes writing:

> [I]t would be a perversion of the [Federal] Employers' Liability Act to hold that [the deceased engineer] could recover for an injury due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more.

Id. at 3.

Similarly, in *Davis v. Kennedy*, 266 U.S. 147 (1924), the Court reversed a judgment for another engineer's estate. In *Davis*, two trains collided head-on on a portion of single line track. The deceased engineer had been given instructions, both company rules and specific information on the date of the accident, never to pass a designated point (where the single line track began) unless he knew, as a fact, that a particular other train (approaching from the opposite direction) had already passed. In spite of these instructions, the engineer ran his train beyond the

designated point before the other train had passed, and a head-on collision resulted, causing the engineer's death. Subsequently, an FELA jury verdict was returned for his estate.

On the appeal, the verdict was set aside as the Court rejected the estate's argument that other members of the crew, along with the deceased engineer, were likewise bound to look out for the approaching train. The Court, echoing *Frese*, observed:

> It seems to us a perversion of [the FELA] to allow [the estate] to recover for an injury directly due to [the engineer's] failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more.

Id. at 148-49.

Likewise, in *Unadilla Valley Ry. Co v. Caldine*, 278 U.S. 139 (1928), the Court, with Justice Holmes again writing, again ruled that the railroad could not be held liable under the FELA where a deceased employee disobeyed printed company rules. In *Caldine*, a conductor on a train traveling on single line track had instructions to pull his train off on to a siding to allow another approaching train to pass. On the date of the accident, the conductor did not have his train come to a stop at the siding and a head-on collision ensued, resulting in the conductor's death. Once again, a jury returned a FELA verdict in favor of the employee's estate.

On the appeal that followed, the estate argued that there was considerable evidence relating to negligence of employees other than the deceased conductor:

- The approaching train was running behind schedule, but that information was never conveyed to the deceased conductor's train; and
- The crew on the train with the deceased conductor "should have refused to obey the conductor and should have conformed to the rule, and [their] act in physically starting the car was even more immediately connected (to the accident) than the order of the deceased."

Id. 140. Justice Holmes disagreed that other employees were negligent and a cause "in whole or in part" of the collision.

> [The conductor] was in command. He expected to be obeyed and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the [railroad] liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts.

Id. at 141-42.

The above cases take on even more significance because, in *Walker v. Lykes Brothers Co.*, 193 F.2d 772 (2d Cir. 1951), Judge Learned Hand cited such opinions for the proposition that one unique type of employee breach of duty creates *an absolute bar* to any recovery under the FELA and the Jones Act (the maritime equivalent of the FELA). In *Walker*, the master on a ship was injured after being struck by a steel filing cabinet. At the ensuing trial,

the master testified that the filing cabinet was improperly secured within the ship, allowing the drawers to come out unexpectedly. A jury verdict was returned for the master.

On appeal, the ship owner argued that, as master of the ship, plaintiff himself was charged with fulfilling the ship owner's non-delegable duty to provide a safe place to work. The master countered by arguing that such evidence merely went to the issue of "contributory negligence" that might reduce or diminish his recovery. The court of appeals disagreed:

> We shall therefore accept the traditional rubric and think of contributory negligence as the breach of a duty to the wrongdoer. The important thing in situations like that at bar is to distinguish between such a duty, which the law imposes upon the injured person, regardless of any conscious assumption of a duty towards the wrongdoer, and *a duty which the injured person has consciously assumed as a term of his employment*. By 'contributory negligence' which results in no more than reducing the amount of an employee's recovery, the [FELA and the Jones Act] means the first; *the second is a bar to recovery*.

Id. at 773 (*emphasis added*) (*citing Wiles, Frese, Davis* and *Caldine*). Thus, "a momentary inattention to one's own safety . . . should not be treated as so serious a fault as the breach of a duty assumed by the employee for the protection of others." *Id.* The court concluded that since plaintiff was master of the ship he was in no position to allege negligence by the ship owner for failing to provide safe working condition – conditions under his control and

supervision. *See also Reinhart v. United States*, 457 F.2d 151, 153-54 (9th Cir. 1972); *Schlichter v. Port Arthur Towing Co.*, 288 F.2d 801, 806-07 (5th Cir.), *cert. denied*, 368 U.S. 828 (1961); *Dixon v. United States*, 219 F.2d 10, 16 (2nd Cir. 1955).

As in *Wiles* and the cases that followed it, Daniels attempted to pervert the very meaning of the FELA. While KCS had a non-delegable duty to provide a safe place for its employees to work, as a corporation, it could discharge that duty only through its employees. In this case, it was Daniels himself, the individual in charge of the movement and speed of the engines, who was legally responsible for ensuring a safe place to work in that respect. Yet it is Daniels who now complains it was not a safe work place in that same respect. Essentially, Daniels has attempted to assert liability against KCS for his own failures. Daniels cannot hold KCS legally responsible for his own negligence and failure to perform an independent duty. Under the controlling federal substantive law, the trial court properly entered a judgment notwithstanding the jury's verdict.

The standard for granting a judgment notwithstanding the verdict motion in an FELA case is the same as that for granting directed verdicts in FELA cases. *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943). With *Brady*, this Court warned that it would not be enough for plaintiffs like Daniels simply to produce evidence of an injury, cast speculations to the jury about other ways to do the job, then sit back to wait and see what happens:

> The weight of evidence under the Employers' Liability Act must be more than a scintilla

> before the case may be properly left to the discretion of the trier of fact – in this case the jury. . . . When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is safe from the mischance of speculation over legally unfounded claims.

Id. at 479-80.

B. KCS Was Entitled To Judgment Notwithstanding The Verdict Because There Is A Void Of Evidence To Support One Element Of The Plaintiff's Verdict Director And, In Fact, The Evidence Elicited During Daniel's Own Case Negated The "Notice" Element Of His Verdict Director

In an FELA case, the plaintiff always bears the burden to prove that: (1) a hazardous condition, unsafe work method, unsafe appliance or inadequate help existed, and (2) the railroad could have foreseen that the particular condition, work method, appliance or inadequate help could cause injury. *Nivens v. St. Louis Southwestern Ry. Co.*, 425 F.2d 114, 118 (5th Cir.), *cert. denied*, 400 U.S. 879 (1970). Foreseeability and notice thus are essential ingredients of liability under the FELA. *Id.*

Whether an injury was foreseeable is determined by "what should have been anticipated and not merely what has happened." *Taylor v. Missouri Pacific R.R. Co.*, 510

S.W.2d 735, 737 (Mo. App. 1974). Accordingly, it is elementary that under the FELA, the railroad must have actual or constructive notice of the danger presented by allegedly hazardous conditions, work methods, inadequate help or tools. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 117 (1963). The railroad cannot be held liable if it had no reasonable way of knowing about the hazard which caused the employee's alleged injury. *Peyton v. St. Louis Southwestern Ry. Co.*, 962 F.2d 832, 833-34 (8th Cir. 1992). The occurrence of an accident or an injury alone does not connote notice, negligence or liability under the FELA. *Glover v. Atchison, Topeka & Santa Fe Ry. Co.*, 841 S.W.2d 211, 213 (Mo. App. 1992). In accordance with this law, the first paragraph of Daniels' verdict director required him to prove KCS had actual or constructive notice of the alleged flaws within its engineer training program. Such a burden was mandated by federal law. *Qualls v. St. Louis Southwestern Ry. Co.*, 799 S.W.2d 84 (Mo. 1990) (*en banc*), *cert. denied*, 499 U.S. 961 (1991).

Recognizing this important burden, Daniels attempted to elicit testimony that complaints were made to KCS about the training program prior to his accident. All such alleged evidence was properly excluded.[1] Accordingly, there is no evidence in this record of any notice to KCS about problems with the training program generally, or Petry in particular, either via prior complaints, criticisms, accidents, "close calls," demands for review of the training program, demands to renegotiate

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[1] Before trial, KCS sent discovery requests seeking any information Daniels possessed of prior complaints or notice. Daniels responded he had no such evidence.

the union contract, etc. In fact, the evidence within Daniels' own case was quite to the contrary.

Daniels' evidence established that KCS' program complied with the collective bargaining agreement and KCS' Operating Rules, KCS' program was essentially the same as that used by all other railroads; there had never been a complaint registered by the union (or anyone else) regarding the training program; and there were no prior accidents arising from the program. Daniels himself admitted neither he, nor anyone else he could identify, ever had a prior problem with trainee Petry, *i.e.*, there was no reason for KCS, or anyone else, to suspect this event would occur. Daniels' evidence, as a matter of law and common sense, fell short of the legal mark of raising a jury question as to notice.

CONCLUSION

Despite petitioner's attempt to characterize this case as a dramatic break in the long tradition of FELA law, a review of the underlying facts and reasoned lower court opinions reveals that this case is consistent with well-established FELA precedent emanating from this Court. Petitioner offers no compelling or substantial reason to have this Court reverse and discard this prior law except for the fact that he does not like the result this law mandates in his case. There are no special or important reasons for granting the petition and thus the Court should deny the petition.

Respectfully submitted,

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